IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.825 OF 2000

Gangsinmgh @ Vijay Harishing Rathod Appellant

versus

The State of Maharashtra Respondent

ALONG WITH
CRIMINAL APPEAL NO.919 OF 2000

Ajaysingh Madanlal Choudhary Appellant

versus

The State of Maharashtra Respondent

Mr.Nitin Jamdar with Mr.Vijay Killedar for appellants.

Mr.A.M.Shringarpure, AGP for respondents.

CORAM : D.G.DESHPANDE, J.

DATE : 17th August 2004

ORAL JUDGEMENT :-

1. Heard learned advocates for the appellants and AGP for respondents. Since both the appeals are arising of an oral judgement in Narcotic Drugs and Psychotropic Substances Case No.253 of 1999 decided by the Special Judge, NDPS, Greater Mumbai in State versus Ajaysingh Madanlal

Choudhary and another, these appeals are decided by this common order.

2. Both the accused were prosecuted under the Narcotic Drugs and Psychotropic Substances Act, 1983 (hereinafter referred to as "NDPS Act" for short). It was the case of the prosecution that both these accused along with some other wanted accused entered into a conspiracy prior to 11th April 1999 to indulge into narcotic transaction and as a consequence thereof, on 11th April 1999 at 12.30 p.m. they were found in possession of 250 gms. of Heroin and cash of Rs.250/- and Rs.175/- each respectively, when the raid was conducted by the Narcotic Cell Police.

3. It is further the case of prosecution that on 11th April 1999 at about 9.30 a.m. PSI Rampyare Rajbhar had received an information that Ajaysingh Madanlal Choudhary was bringing Heroin from Rajasthan and at about 12.00 noon to 1.00 p.a. he will sell the Heroin to one Gangasingh Rathod in front of Lucky Hotel, Andheri (West). PSI Rampyare Rajbhar (PW1) took information book entry and delivered the extract of information to DCP, ACP, Senior P.I. and P.I. Rane. Thereafter a trop was arranged under the

directions of P.I.Rane. Panch witnesses were brought including Panch Laxman Temkar (PW3). A pre-trap panchanama was made which is at Exhibit-11. A station diary entry was made. The police party was left in an Ambassador car and Jypsy for the spot. They were standing in front of Lucky Hotel and when the accused came there, they were identified by the informant. Then the raid was carried out. Accused was individually informed whether they wanted to get searched in presence of Magistrate or Gazetted Officer. Both accused declined and thereafter they were searched and 250 gms. of Heroin was found in a polythene packet. Two samples of 5 gms. was taken separately and sealed. A detailed panchanama was made. Original panchanama is at Exhibit-18. A complaint came to be lodged against both the accused vide Exhibit-14. Thereafter two samples were sent to the office of C.A.. The C.A. report is at Exhibit-20 and both the samples were found to contain 10% Heroin. It is in this background that the accused faced trial. The Trial Court found that charges were proved and, therefore, accused came to be convicted and sentenced to 10 years RI and fine of Rs.1.00 lakh under different sections of NDPS Act. Hence these appeals.

4. One of the main contentions raised by the learned counsel for the accused was that there was no compliance to the mandatory provisions of NDPS Act regarding giving an opportunity and right of the accused whether they wanted the search to be taken in presence of the Magistrate or Gazetted Officer. My attention was invited in this regard to the Panchanama Exhibit-17 prepared after the raid was over. It is stated in the Panchanama that P.I.Rane told both the accused about the information received by PSI Rajbhar and that they wanted to search the accused for the suspected substances. Thus as per the Panchanama, the accused were asked whether they want to get themselves searched by police and each accused was asked to give their willingness in writing but the accused declined to do so. Section 50 of the NDPS Act requires that any officer duly authorised is about to search any person, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments or to the nearest Magistrate. This is a mandatory requirement of statute to give authenticity to the searches and to substantiate that this requirement was complied with, it has

to be specifically mentioned in the Panchanama that accused were informed of their right to get searched in presence of a Magistrate or a Gazetted Officer. This should not be merely a formality. However, the panchanama, as stated above, does not show that the accused were made known about their right and they were made aware that if they desire or if they want, they could be taken or the search could be taken before a Gazetted Officer or a Magistrate. The panchanama mentions about the search taken before the police. That is no compliance to Section 50. Even if PW-1 PSI Rajbhar stated in his evidence in para 12 that accused were made aware of their right as to whether they want their search to be taken in presence of Magistrate of a Gazetted Officer, the panchanama Exhibit-17 does not support this contention.

5. Another important aspect of the matter was brought to my notice and it was contended by learned counsel for the accused that this particular aspect namely keeping certain columns blank in FIR (Exhibit-14) creates strong doubts about entire prosecution case. My attention was invited to para 38 of the cross examination of PW-1. Column no.3C and 5 of the FIR are blank.

It is about direction and distance from police station and beat number. Then column no.7 about the details of known accused with full particulars is also not filled. In column no.9 there is no mention about amount seized from the accused, though as per the panchanama specific amounts were seized from each of the accused. Learned counsel for the accused contended that the names of persons who brought the narcotic drugs were known to the police as per the prosecution case. The accused were identified by the informant in front of Lucky Hotel. Then before starting the actual raid, names of accused were asked and ascertained. But if all this has really happened, then there is no reason why column no.7 has been kept blank namely "Details of known accused with full particulars".

6. Learned advocate for the accused further contended that P.I.Rane was the officer, as per the evidence of PW-1 and the Panch, who informed the accused regarding compliance to Section 52 of the NDPS Act. However, the prosecution did not examine P.I.Rane. According to the learned advocate for the accused the best evidence regarding compliance of this mandatory provision ought to have been given by the prosecution. He

further contended that in the panchanama and in the evidence of PW-1 what is stated regarding this compliance is that the accused were informed whether they wanted their search to be taken in presence of Gazetted Officer or Magistrate, whereas, the Panch states that accused were told whether they wanted to be searched before "Rajpatrit Aadhikari or Dandadhikari". Mr.Jamdar contended that these words though literally translation of words "Gazetted Officer and Magistrate" could not have at all understood by accused, who only new Hindi even as per the prosecution case. The panch witness no where says that English substitutes for these words namely "Gazetted Officer and Magistrate" were used very specifically in this regard. Particularly Mr.Jamdar contended that as per the information received by PW-1 and recorded in Exhibit-9A against Ajaysingh that he was to come to the spot for selling the narcotic drugs to Gangasingh. Therefore, there is variance in the information received and the actual happenings. Therefore, according to Mr.Jamdar all these lacunas in the prosecution case coupled with the submissions referred to above affect the veracity of the witnesses and the evidence given by them and therefore benefit of doubt should have been

given to the accused.

7. Out of three submissions of Mr.Jamdar, non examining P.I.Rajbhar may not be fatal to the prosecution because as per the record PW-1 was an officer in the raiding party. However, it would have been proper in the circumstances if P.I.Rajbhar had been examined. The variance in the known report and the actual happening, as stated above, may not be of much help to the accused. But the evidence of Panch recording compliance and use of specific word "Rajpatrit Aadhakari and Dandadhikari" in place of "Gazetted Officer and Magistrate" and the difference in the panchanama, as noted above, do create doubt and benefit of which has to be given to the accused. I have already noted that compliance of Section 50 is mandatory. There is strong and serious doubt about proper compliance and therefore, benefit of doubt has to be given to the accused. I, therefore, pass following order.

8. Both the appeals are allowed. The conviction of all the accused i.e. accused nos.1 and 2 u/ss.29 r/w Sec.21 and 8(c) of NDPS Act, 1985 and the sentence imposed are set aside. They are in custody. They shall be released forthwith, if

not required in any other case. If the accused have paid any fine, the same shall be returned to them. Rest of the order about disposal of the Muddemal property shall remain the same.

(D.G.DESHPANDE, J.)